

# PROGRAM ON NEGOTIATION

Prepared by Keith A. Belzer  
Devanie, Belzer & Schroeder, S.C.  
608.784.8055  
[Keith@DevanieBelzerLaw.com](mailto:Keith@DevanieBelzerLaw.com)  
[www.devaniebelzerlaw.com](http://www.devaniebelzerlaw.com)

---

## ADVANCED NEGOTIATION THEORIES OUTLINE

- I. **Huthwaite:** Since 1968, a number of long-term studies have been carried out by members of the Huthwaite, Inc. organization, using behavior analysis methods. These studies have allowed direct observation during real negotiations, so that an objective and quantified record can be collected to show how skilled negotiators behave in relation to the average negotiators.
  
- II. **Huthwaite success criteria.**
  - A. Negotiators must be rated as effective by both sides.
  - B. Negotiators should have a track record of significant success.
  - C. Negotiators should have a low incidence of implementation failures.
  
- III. **Huthwaite results - planning.**
  - A. Amount of planning time?  
  
No discernable difference.
  - B. Exploration of options?  
  
The skilled negotiator considers a wider range of outcomes or options for action than the average negotiator. It is not just the amount of planning time that makes for success, but how that time is used. Skilled negotiators were concerned with the whole spectrum of possibilities, both those they could introduce themselves and those that might be introduced by the people they negotiate with.
  - C. Concentration on areas of common ground?

Both concentrate on areas of common ground, but skilled negotiators gave over 3 times as much attention to common ground areas as did average negotiators. 38% of skilled negotiators' comments were about areas of anticipated agreement or common ground. This is important in that a skilled negotiator builds a climate of agreement so that undue concentration on conflicts is unnecessary.

Examples of potential areas of agreement:

Agreement on a particular charge.  
 Agreement on probation.  
 Agreement on amount of probation.  
 Agreement on conditions of probation. (assessments, counseling, no alcohol, getting a license, getting an HSED, GED or diploma)  
 Agreement on a written letter of apology.  
 Agreement on an amount of restitution.  
 Agreement on a particular kind of community service.  
 Agreement on some of the facts.  
 Agreement on the need for jail.  
 Agreement on an amount of jail.  
 Agreement on a fine.  
 Agreement on the amount of a fine.  
 Agreement to a mediated meeting with the victim.

D. Setting goals?

Skilled negotiators were significantly more likely to set upper and lower limits within a range. Average negotiators were more likely to plan their objectives around a fixed point.

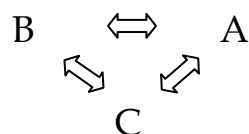
E. Sequencing of negotiation points.

Average negotiators place very heavy reliance on sequence planning. Skilled negotiators tended to plan around each individual issue in a way that was independent of any sequence. Issue planning not sequence planning.

**Average Negotiator**

$A \Rightarrow B \Rightarrow C$

**Skilled Negotiator**



**IV. Huthwaite results – face-to-face behavior.**

A. Use of irritators?

Using terms like “generous plea offer,” “fair disposition of matter,” “reasonable attempt to resolve case” have very negligible value in persuading the other party and cause irritation. These words imply that the other party is not generous, fair, or reasonable. Most negotiators, average and skilled, avoid the gratuitous use of direct insults or unfavorable value judgments. There is little to be gained from saying unfavorable things about the other party during face-to-face exchanges. However, the average negotiator says gratuitously favorable things about themselves fairly regularly, while the skilled negotiator tended to avoid them.

B. Attacking and defending spirals

Average negotiators are three times as likely to engage in behavior that is seen as attacking or defensive. Average negotiators usually begin their attacking gently, working their way up to more intense attacks slowly, and in doing so, causing the other party to build up its defensive behavior in the characteristic defending/attacking cycle.

Skilled negotiators, although less likely to use attacking behavior, when deciding to attack gave no warning and attack hard.

C. Counterproposals?

Counter proposals are generally put forward at a point where the other party is least receptive, right after they have just made a proposal.

At this point, counter proposals are perceived as blocking or disagreeing by the other party, not as proposals.

Skilled negotiators make counter proposals much less frequently than average negotiators. Skilled negotiators make counter proposals 1.7 times per hour of negotiation.

D. Warning that a question or a proposal was coming?

“Can I ask you a question – how much probation do you think is necessary?”

“Can I make a proposal – make Johnny shovel the grocery store sidewalk all winter instead of watching TV in jail?”

Skilled negotiators are four times as likely to label their behavior as average negotiators.

Behavior labeling draws the attention of the listener to the behavior. It slows the negotiation down, thereby reducing stress on both parties. It also adds a level of formality that takes the negotiation away from personalities. It also reduces ambiguity and lead to clearer communication.

E. Warning that a disagreement was coming?

Average negotiators will characteristically say “I disagree with that because . . .”

STATEMENT OF DISAGREEMENT > REASON OR EXPLANATION

Skilled negotiators are more likely to begin with reasons and lead up to the disagreement.

REASON OR EXPLANATION > STATEMENT OF DISAGREEMENT

This creates minimal loss of face for the prosecutor.

F. Testing understanding and summarizing?

Skilled negotiators spend twice as much time testing understanding and summarizing.

This technique can be used to reflect on a position that the district attorney has taken. “As I understand it, you would not consider any sort of a plea bargain that does not include a felony?”

G. Asking questions?

Skilled negotiators ask more than twice as many questions as average negotiators.

21.3% of a skilled negotiators behavior consists of asking questions.

- Questions provide data about the other party’s thinking and feeling.
- Questions give control over the discussion.
- Questions are more acceptable alternatives to direct disagreement.
- Questions keep the other party active and reduce their thinking time.
- Questions give a negotiator breathing space to allow time to marshal their own thoughts.
- Questions should be carefully crafted so as not to offend the prosecutor or create defensiveness.
- Questions should not put the prosecutor on the spot.

1. A felony!!? **VERY BAD**
2. What possible purpose could a felony serve? **BAD**
3. Why do you want a felony conviction for a kid with no record?  
**NOT QUITE AS BAD**
4. I’m just curious, why do you think a felony is necessary?  
**BETTER**
5. I’d like to ask you a question. Randy doesn’t have a record at this point, I’m wondering if there is any way that we might be able to avoid a felony conviction in this case. **GOOD**

H. Giving internal information – feelings?

Skilled negotiators are more likely to give information about their feelings than average negotiators. The most characteristic and noticeable form of giving internal information is a feelings commentary, where the negotiator talks about his feelings and the impression the other party has made on them.

Psychologists tell us that the expression of feelings is directly linked to establishing trust. Sharing internal information in the middle of a negotiation gives the other party a feeling of security because such things as motives appear to be explicit and above board.

<u>Behavior</u>	the
·perceptions	deeper
·feelings	you
·attitudes	see
·motives	the
·beliefs	more
·personality	you
	trust

- I. Do more reasons in favor of our argument, tip the scale in our favor?



Skilled negotiators use fewer reasons to back up each argument. Average negotiators give almost twice as many reasons to support each argument. The skilled negotiator tends to advance single reasons insistently, only moving to subsidiary reasons if the main reason is clearly losing ground. By advancing a whole series of reasons to back an argument, the negotiator exposes a flank and gives the other party a choice of which reason to dispute. If we give five reasons for not sending someone to prison and the third reason is weak, the prosecutor will exploit this reason in their response. The more reasons we advance, the more likely an argument is potentially diluted.

## V. Huthwaite – reviewing the negotiation after completion?

Two-thirds of skilled negotiators spend some time reviewing each negotiation.

Less than one-half of average negotiators spend time reviewing negotiations.

## VI. Where to negotiate?

- A. Consider negotiating at your office.

1. Creates psychological advantage of having prosecutor come to you.
2. We have more control over the negotiation atmosphere.
3. If you have never tried it before it may be just enough of a change in the negotiation dynamic to break a stalemate on a difficult case.

- B. Negotiating at the prosecutor's office.

1. No office distractions.
  2. You can request to see a file, evidence, etc.
  3. You can defer providing information that your client has or is at your office.
- C. A neutral location.
- D. Negotiating by telephone.
1. Easier for prosecutor to objectify attorney and client.
  2. Neither side can really get a feel for the negotiation position of the other.
  3. Negotiations tend to be much shorter on the telephone. This may signal a lack of commitment on your part to the prosecutor.
- E. Negotiating by letter.
1. Has advantage of reducing all aspects of negotiation to writing.
  2. Can allow a prosecutor who does not react well under pressure time to consider a reasonable option.
  3. Allows time for defense attorney to make a well thought out proposal.
  4. A follow up letter on a standing offer can condition acceptance upon agreement to "one minor modification."
  5. Unless you are an adept writer, negotiating by letter may also allow prosecutor to objectify you and your client.

## **VII. Miscellaneous advanced negotiation techniques.**

- A. Look for alternatives to no. Ask "why?" to continue the negotiation.
- B. Look for ways to buy time.
- C. Consider bringing demonstrative evidence to the negotiation. (Pictures, report cards, work records, etc.)
- D. In any negotiation, always try to negotiate with the person who has ultimate authority.

## **VIII. Build rapport.**

Building rapport is one of the most valuable tools we have as attorneys. Rapport is nothing more than meeting people on their own level. The dictionary defines rapport as a relationship marked by harmony, conformity, accord, or affinity. Rapport signals a relationship exemplified by agreement, by alignment, or by likeness or similarity. There are two ways to look at other people. We can choose to emphasize the differences between ourselves or we can choose to emphasize the similarities. It is virtually impossible to change another person. Attempts to change someone are generally doomed from the outset. Yet we know that we have influence over other people. The influence may be strong or it may be slight, it may be positive or it may be negative. By becoming more flexible in our approaches to others, by becoming more aware of both

our own patterns and those of our opponents, we can greatly increase our ability to strongly influence our opponent in a positive direction.

- A. Pacing. Pacing means meeting our opponent where he or she is. Reflecting what he or she knows or assumes to be true. Matching some part of his or her ongoing experience. Pacing is a very specific technique for establishing rapport with virtually anyone. It is being or becoming like other people so that we can get their attention, friendship and help. There are many ways we can pace another person:
  - 1. Mood.
  - 2. Body language.
  - 3. Speech patterns. (Rate of speech, tonality, volume, words and phrases, and images.)
  - 4. Beliefs and opinions.
  - 5. Breathing.
- B. Leading. When we're in step with another person, the next step you take, the other person is apt to follow. One of the best ways to influence another's behavior is to first synchronize yourself with some aspect of his or her behavior. People will follow your lead if you match them first. Meet the prosecutor where she already is, then suggest new options.
- C. Perceptual modes. Each person has a dominant or primary mode of perception. When we make initial contact with a prosecutor, she will probably be thinking in one of three main representational systems. She will be generating visual images, talking to herself and hearing sounds, or having feelings. The simplest way to identify another person's dominant perceptual mode is to pay close attention to the words, phrases or images she uses.
  - 1. Visual mode. "I see what you mean." "That suggestion looks good to me." "I have to look at the big picture."
  - 2. Auditory mode. "Tell me again what you mean." "Can you say that again, I'm not sure I heard you correctly?" "Your idea sounds like a good starting point." "I hear what you're saying, I just disagree."
  - 3. Feeling mode. "I have a sense of where you are coming from." "That offer doesn't feel right to me." "My gut tells me that your guy was the leader."

Identifying which mode is dominant for other people at any given time is an important key to their pattern of understanding. Therefore it is an important key to your understanding of them and how to get them to understand you. Once we have identified a prosecutor's mode of thinking, we should paint word pictures in that particular mode. We want to present ideas in such a way that a prosecutor can see, hear or feel what we are talking about for themselves.

## **IX. Common negotiation tactics to be aware of.**

- A. Extreme offers.
- B. Environmental tactics. (Lower chair, behind a desk, prosecutor's office.)
- C. Walking out. (Literally or figuratively.)
- D. Visible reactions to an offer.
- E. Arbitrary deadlines.
- F. Personal attack.
- G. Threats.
- H. Misinformation.
- I. Refusal to negotiate.
- J. Escalating demands.
- K. Giving power over to a higher authority.

These behaviors can be gently pointed out to the prosecutor in such a way that the prosecutor does not lose face but everyone is aware of what manipulation is taking place.

**X. What if your opponent just will not negotiate in a principled way?**

- A. Concentrate on the merits of the case, rather than the positions. The method wins people over.
- B. Zen Negotiation. When your opponent pushes, do not push back. Do not reject their ideas or feel defensive about your own. Sidestep the attack and deflect it against the problem. Typically, an "attacking" negotiator launches their attack in one of three ways:
  1. Asserting their position forcefully. When a prosecutor sets forth their position in a forceful manner, neither reject the position nor accept it. Treat their position as a possible option. Look for the reasons behind their position. Present a hypothetical that incorporates their position in some way that allows them to see your position. For example, describe the conversation that you will have with your client or your client's parents when you convey the prosecutor's unreasonable offer.
  2. Attacking your ideas. Do not defend your ideas, invite criticism and advice. For example: "What concerns of yours are not addressed by agreeing to a deferred prosecution agreement?" Use the expressed position of the other negotiator to rework your offer in a way that addresses their concerns. Another way of reversing and attack on your ideas is to turn the statement around and ask for advice from the prosecutor. "What would you do with a client in this position?" This may force the prosecutor to see thing from your position.



3. Attacking you. Resist the temptation to defend yourself or to attack the prosecutor. Instead, sit back and listen. Show that you understand what they are saying. When they are finished, restate their attack as an attack on the problem. "When you say that I'm ridiculous to ask for probation in this case, I hear you expressing a concern for the community. I share your concern. I'm wondering if prison is the only way to protect the community in this particular case."
- C. Ask questions. Statements generate resistance, questions generate information.
- D. Use silence. When an unreasonable offer is made, the best thing to do may be to sit there silently and let the prosecutor try to justify their position. Alternatively, silence in response to an insufficient answer to one of your questions sends the same message. As professional interrogators realize, silence creates an uncomfortable feeling which many people feel compelled to fill with additional answers or explanations. Don't fill the silence with unnecessary questions or comments of your own.
- E. BATNA

#### **X. Review and conclusion.**

1. We can't apply all of information at once. Pick a few ideas to implement at a time.
2. Negotiate consciously.
3. Everyone has a style of negotiating – negotiate based on the situation not your personality.
4. Look at people as people, not problems. Keep the focus on the problem not the person.
5. Be creative when looking for possible outcomes and options.
6. Accentuate the positive during the negotiation.
7. Remain flexible during negotiation.
8. Avoid: irritators, immediate counter proposals, defend/attack spirals, and using too many reasons to argue a point.
9. Use: behavior labeling, (unless disagreeing), testing understanding and summarizing, lots of questions, feelings commentary.
10. Develop rapport.
11. Keep your alternative to negotiating in mind. Preparing for trial decreases the appeal of the district attorney's best alternative to negotiated agreement.
12. Do not boast about successful negotiations.
13. Not who's winning, but how do we achieve a better process for dealing with prosecutors and legitimate varying interests.

#### **Bibliography and Suggested Reading List**

A Context-Based Theory of Strategy Selection in Legal Negotiations, 46 Ohio St. L.J. 41 (1985).  
The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach, Rodney J. Uphoff, 2 N.Y. Univ. Clinical Law Review 73 (1995)  
Effective Negotiation, Winning through Confrontation and Cooperation, Gerald R. Williams (The Professional Education Group, Inc., 1994)  
Getting Past No: Negotiating with Difficult People, William Ury (Bantam Books, 1991)  
Getting Ready to Negotiate, Roger Fisher and Danny Ertel (Penguin Books, 1995)  
Getting to Yes, by Roger Fisher and William Ury (Penguin Books, 1981)  
How to Win Friends and Influence People, Dale Carnegie (Simon & Schuster, 1936)  
Huthwaite Study on Negotiation, Huthwaite, Inc. (1990)  
Negotiate Smart, Nicholas Reid Schaffzin (Princeton Review Publishing, 1997)  
Negotiation in the Practice of Law, Michelle Hermann and Mark Bennett (American law Institute, 1996)  
The Magic of Rapport, Jerry Richardson (Meta Publications, 1987)  
A Practical Guide to Negotiation, Thomas F. Guernsey (National Institute for Trial Advocacy, 1996)  
Secrets of Power Negotiating, Roger Dawson (Prentice Hall, 1995)  
Spin Selling, Neil Rackham (McGraw Hill, Inc., 1988)  
Spin Selling Field Book, Neil Rackham (McGraw Hill, Inc., 1996)  
Utilitarian Analysis of the Objectives of Criminal Plea Negotiation and Negotiation Strategy Choice, Joseph Vanover, 1998 J. Disp. Resol. 183  
You Can Negotiate Anything, Herb Cohen (Bantam Books, 1980)